COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1315

COMMONWEALTH

vs.

JULIO AYALA.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth appeals from an order allowing the defendant's motion for resentencing brought under Mass. R. Crim. P. 30 (a), as appearing in 435 Mass. 1501 (2001).[2] The defendant argued that the sentence he received on June 2, 2011, after a violation of his probation, is unconstitutional under the Eighth Amendment to the United States Constitution and art. 26 of Massachusetts Declaration of Rights. Following a hearing, a judge of the Superior Court, who was the same judge who imposed

[1] By custom our case caption uses the defendant's name as appearing in the indictments. The parties and the record before us indicate, however, that the defendant is currently known as Caesar (or Ceasar) J. Delgado.

[2] The defendant filed two motions, a motion to vacate guilty pleas and for a new trial, pursuant to Mass. R. Crim. P. 30 (b), and a motion to vacate revocation of probation and for resentencing, pursuant to Mass. R. Crim. P. 30 (a). This appeal concerns only the judge's allowance of the motion for resentencing.

the sentence at issue, agreed with the defendant and allowed the motion. We reverse.

Background. The procedural history of the case is extensive, and we relate only so much as necessary to provide context for our decision. On October 3, 2000, the defendant pleaded guilty to four counts of forcible rape of a child under sixteen and four counts of indecent assault and battery on a child under fourteen. The charges stemmed from the defendant's sexual abuse of his then-girlfriend's two daughters. The plea judge sentenced the defendant to five years to five years and one day in State prison on each indecent assault and battery charge, to be served concurrently, and imposed from-and-after terms of ten years' supervised probation on the rape convictions, to run concurrently. The defendant served the incarcerated portion of his sentence and was released on probation. Approximately three and one-half years later, on September 17, 2007, he stipulated to a violation of his probation.[3] His probation was continued and the defendant was ordered to participate in sex offender and substance abuse treatments. On October 20, 2010, the defendant again was found

[3] The violation was based on the defendant leaving the Commonwealth without permission to visit his family in Rhode Island.

to have violated the terms of his probation[4] and on June 2, 2011, a judge other than the original plea judge sentenced him to serve four to twenty years in State prison on one count of rape of a child and terminated his probation on the remaining three counts of rape of a child. At the sentencing hearing, the judge explained his rationale for the sentence, stating,

> "So, it looks to me like [the defendant] must be incarcerated, not necessarily for a sentence that requires that he serve a long prison term, but he must be supervised for a long period of time. . . . I think [the defendant] should be under supervision of the parole board, and I think probation has done all that it can do with him. So, I'm going to sentence [the defendant] to a concurrent sentence of four years to twenty years, and that's concurrent with any sentence serving or to be served. It is not my intention that [the defendant] serve twenty years. It is, however, my intention that he be on probation -- I'm sorry, on parole for a very long time."

Soon thereafter, on July 1, 2011, the defendant filed a motion for reconsideration of his sentence, contending that because the parole rate had sharply declined due to the appointment of a new chairman of the Massachusetts Parole Board (parole board), the possibility that he would be paroled was uncertain. He also claimed that the sentence was outside the

[4] The bases for this violation of probation were described by the probation officer as follows: the defendant did not report to probation in April and May of 2008; he did not appear for a surrender hearing on May 29, 2008; he removed his GPS bracelet; he went to Rhode Island where he did not register as a sex offender; and, on September 3, 2009, he was convicted in Rhode Island for failure to register as a sex offender and sentenced to serve two years.

guidelines and not in accord with the original sentence imposed on October 3, 2000. The motion was denied in a margin endorsement. The defendant subsequently appealed his sentence to the Appellate Division and the sentence was affirmed on May 10, 2016.

Meanwhile, in 2014, the defendant's petition for parole was approved, but was rescinded after the parole board learned that the defendant had been charged in Rhode Island for failing to register as a sex offender. By 2017, the board concluded, among other things, that the defendant had provided misleading information and was a high risk.

On February 5, 2018, the defendant filed the motion which is the subject of this appeal. In his written decision allowing the motion, the judge stated that the defendant's "sentence is inappropriate in light of the doctrine of the separation of powers and the inconsistency with the Court's intent at sentencing; and . . . relief is warranted under Mass. R. Crim. P. 30 (a), the Eighth Amendment to the United States Constitution and [art.] 26 of the Massachusetts Declaration of Rights." The judge then vacated the sentence he had imposed on June 2, 2011, and resentenced the defendant to two years' probation.

Discussion. Rule 30(a) permits a defendant to seek relief from an illegal sentence. See Commonwealth v. Walters, 479

Mass. 277, 280 (2018). A sentence is illegal if it is not permitted by law or is "premised on a major misunderstanding by the sentencing judge as to the legal bounds of [the judge's] authority." Commonwealth v. McGuinness, 421 Mass. 472, 475 (1995).

The sentence in question was not illegal. To begin with, the sentence was not in excess of the punishment proscribed by the relevant statute, G. L. c. 265, § 22A, which carries a maximum sentence of life. See Commonwealth v. Doucette, 81 Mass. App. Ct. 740, 744 (2012) (after revoking straight probation, "the judge may impose any sentence that could have been imposed at the original [sentencing] hearing, . . . but may not punish the defendant for the [probation] violation itself").

Second, there is no indication that the judge had any "major misunderstanding" as to the bounds of his authority at the time he imposed the 2011 sentence. See Walters, 479 Mass. at 281 (defendant argued sentence was illegal because resentencing judge did not properly apply law). Rather, the record reflects that the judge appropriately considered the severity of the defendant's crimes and his poor compliance with probation, including the fact that he had cut off his GPS bracelet and left the Commonwealth on more than one occasion.

In addition, the sentence was not, as the judge put it, "inappropriate in light of the doctrine of the separation of

powers" or "inconsisten[t] with the Court's intent at sentencing." We assume that the judge, at the time he imposed sentence, was aware that "[t]he granting of parole is a discretionary act of the parole board" and "is a function of the executive branch of government." Commonwealth v. Amirault, 415 Mass. 112, 116 (1993). We further assume the judge was aware that "neither the Eighth Amendment nor art. 26 requires parole decisions to be vested in the judicial branch." Commonwealth v. Okoro, 471 Mass. 51, 63 (2015). That the sentence imposed on June 2, 2011, was precisely what the judge intended is apparent from the judge's statements at the time -- that the defendant "must be incarcerated," "must be supervised for a long period of time," and must be "on parole for a very long time." It is true that the judge did not intend for the defendant to serve the entire twenty-year term in prison; however, a judge may not "revise or revoke sentences when the parole board does not act in accordance with [the] judge's expectations." Amirault, supra (after defendants were denied parole, it was improper for sentencing judge to revise and revoke sentences to reflect judge's intention of when they should have been paroled). See Commonwealth v. Layne, 21 Mass. App. Ct. 17, 18-19 (1985) (even assuming sentence "imposed under a misapprehension of the defendant's parole eligibility date, the sentence was not subject to correction under [rule] 30[a]").

Finally, the sentence did not violate the prohibition against cruel and unusual punishments under the Eighth Amendment or under art. 26. Our cases recognize that it is possible that imprisonment for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment. However, to reach the level of cruel and unusual, the punishment must be so disproportionate to the crime that it "shocks the conscience and offends fundamental notions of human dignity." Commonwealth v. Obi, 475 Mass. 541, 546 (2016), quoting Commonwealth v. Jackson, 369 Mass. 904, 910 (1976). That is not the case here. See, e.g., Cepulonis v. Commonwealth, 384 Mass. 495, 496-499 (1981) (sentence of forty to fifty years for violation of G. L. c. 269, § 10 [c], does not constitute cruel and unusual punishment). See also Commonwealth v. Medina, 64 Mass. App. Ct. 708, 710, 722 (2005) (concurrent life terms and probation imposed for three convictions of rape of child, followed by twenty- to thirty-year terms for five convictions of indecent assault and battery on child under fourteen held not cruel or unusual; sentence was "lawful and within the statutory limits" and judge properly considered relevant factors). Contrast Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 657-659 (2013) (mandatory imposition of sentence of life in prison without possibility of parole on individuals who were under age of eighteen when they

committed murder in first degree violates prohibition against excessive punishments under both Eighth Amendment and art. 26).

Conclusion. We vacate the judge's order allowing the defendant's motion for resentencing and remand to the Superior Court where the original sentence imposed on June 2, 2011, is to be reinstated.

So ordered.

By the Court (Green, C.J., Vuono & Lemire, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: July 2, 2019.

[5] The panelists are listed in order of seniority.